United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

-v-

MICHAEL GARNDER,

Appellant

----------x

B
P/S

76-1339

BRIEF FOR APPELLANT MICHAEL GARDNER

Appeal from A Judgment of
Conviction In The United
States District Court For
The Southern District of
New York

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-v-

Docket No. 76-1339

MICHAEL GARDNER,

Appellant.

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BRIEF FOR APPELLANT MICHAEL GARDNER

Michael Gardner appeals from his conviction of July 7, 1976 in the United States District Court for the Southern District of New York (Pierce, J.) upon a jury verdict of guilty on all counts of a thirteen count indictment alleging mail fraud and fictitious name violations, 18 U.S.C. 1341-43, 2314. His sentence was five years concurrently on each of counts one through twelve and a one year concurrent sentence on count thirteen. He receives, however, credit for a sentence he is now serving on a prior conviction in the Northern District of Illinois. Counsel on this appeal is assigned under the CJA.

The indictment, 76 Cr. 21, joined two other defendants. Susan Braunig, Gardner's secretary, was severed at the beginning of trial. Sy Guthrie went to trial with Gardner. The jury acquitted him.

The indictment contained an additional perjury count against Guthrie and two against Braunig. Those counts

also were severed for separate trial.

ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient for the jury to find Gardner guilty on the counts charged beyond a reasonable doubt (Points I, II, III, IV).

2. Whether in light of United States v. Maze, 414 U.S. 395 (1974) the Government proved a violation of the mail fraud statute arising out of the presentation to Barclays Bank of allegedly forged checks (Point IV).

3. Whether the district court erred in admitting such massive evidence of similar acts, as well as two prior convictions of Gardner, that the jury could not distinguish between the issue of Gardner's generally bad character and whether he committed the specific crimes charged in the indictment (Point V).

4. Whether the district court erred in barring Judith Gardner's testimony on the grounds she had been present in the court in violation of an exclusion order; in barring Gardner from referring to his prior acquittals although the Government had challenged his credibility by prior convictions; and in barring Gardner from introducing in evidence or referring in summation to the Government's Bill of Particulars (Point VI).

5. Whether the district court erred in denying Gardner's request for a psychiatric examination and competency hearing (Point VII).

STATEMENT OF THE CASE

The thirteen counts in the indictment cover six episodes.

Four times in 1974 and 1975 Gardner received advance fees from parties for which he sought to obtain financing: White Holdings, Porklean Farms, Fun Tyme, and Myrtle Rupe. The Government charged that he had no intention of raising the money in question and simply pocketed the advance fee proceeds.

In December 1974 co-defendant Braunig deposited two Canadian checks in Barclays Bank in New York. The Government charged that these were forged by Gardner.

In 1974 and 1975 Braunig did not pay some of her department store and credit card accounts. The Government charged that she acted under Gardner's direction in opening the accounts, that she made false statements in connection therewith, and that together they ran up the delinquent accounts.

The trial did not cover only these episodes. The Government introduced practically every unhappy event of Gardner's life over the last four years. There were many, from marital troubles to bounced checks to convictions in the Southern District of New York and Northern District of Illinois. The jury convicted because of this staggering demonstration of Gardner's other misdeeds. But for this it would have been impossible, as we shall show, for the jury to have found beyond a reasonable doubt that the proof sustained the charges in the thirteen specific counts of the indictment.

White Holdings (Indictment, Counts 1 and 4)

Arthur White, through White Holdings Ltd., owns numerous hotels in Canadian Niagara Falls. He acquired several from the Sheraton Corporation, with a substantial purchase money first mortgage, and a second mortgage obligation to another company to raise the $2 million down payment (91-92).*

In early February 1974 White met with Gardner on a public offering of White Holding stock (95). Joseph Fuger, who sought investments for White on commission, brought the parties together (254). Gardner proposed to organize a Panamanian company to acquire half (later 40%) of White Holdings' assets and to channel $15 million into the company by selling the Panamanian shares in Europe (96). Gardner requested $100,000 as necessary expense money, to be returned from the first monies raised (101). He urged White not to delay since there was much work to be done and the European market required that the offering be out by July 1 (102-03).

Three days later the parties met in New York (104). They discussed a draft agreement whereby White would be responsible for $75,000 in total expense money, he and Gardner then each advancing $25,000 and White another $25,000 within thirty days (110-11, GX 3).

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* Numbered references, unless otherwise specified, are to the transcript of trial. GX refers to the Government's trial exhibits, X to Gardner's, and A to the Appendix to this Brief.

Our statement of facts sets forth the highlights of the extensive proof, taking the view most favorable to the Government. We save for argument a more detailed review of the proof which defeated the Government's effort to meet its burden.

On February 18 Gardner came to Niagara Falls (126). In a further draft White's responsibility was for $40,000 in expenses "regardless of [the] amount of expenses incurred by Gardner." White and Gardner would each advance $25,000 immediately, and Joseph Fuger, $15,000 (GX 8, par. 9). However, Ross Allen, White's attorney, raised continuing questions about the tax ramifications of the European sale (148). Gardner then produced his check for $25,000, asking for White's in a similar amount because "he was ready to get going and needed that check to get things in motion" (148). White agreed. He drew his check directly to Gardner (GX 1) in spite of Fuger's request that he be a joint payee for control purposes (149). Gardner was supposed to, but didn't, deposit both checks in a New York City account the following day (152).

An agreement was finally signed on February 28, 1974 (GX 13, A-52, 155). Gardner agreed to form an Ontario corporation to subscribe to and pay $15 million for 40% of the shares of White Holdings (156-57). Although not expressed, a Panamanian corporation was to own the shares of the Ontario corporation, and Gardner was to market shares of the former in Europe (156-57). The first payment of $400,000 would take place May 30, 1974, a second $600,000 on June 30, 1974, and others thereafter through June 30, 1977. The agreement recited that Gardner and White had each posted $25,000 "for due performance," with Gardner to return $25,000 to White Holdings in the event that he did not perform (158).

At the early meetings with White and Allen, Gardner was accompanied by several individuals who were to assist him in the public offering (9.). Principal among them was J. Kirby. He worked on the project in Canada (152-53) and then travelled to Germany to accomplish the financing (96). The others were Lawrence Clements, to help with sales in England and other parts of Europe and Fred Riley, with financial connections in France (263-64).

Porklean Farms Ltd. (Counts 2 and 3)

Porklean Farms Ltd. raises hogs and sells breeding stock (163). Ross Allen is one of its owners. As the White deal progressed Allen suggested that Gardner arrange a similar European public offering for Porklean.

Gardner proposed to raise $6 million in Germany (166). He asked for $15,000 in expenses, and he would fund any expenses over that (GX 17, 166).

Allen (for Porklean) and Gardner signed an agreement as of March 1, 1974 (GX 19, A-58). Gardner was to organize a West German corporation, sell shares, and produce a net of $6 million (174-75). Porklean was to pay a maximum of $15,000 for the fees and expenses of setting up the German corporation (par. 8). Gardner wanted the $15,000 all at once. Allen refused, and gave him one check for $5,000 dated March 10, 1974, another for $5,000 post-dated a week after that, and a third and last for $5,000 dated about two weeks after the second (167-68).

Gardner cashed the first check (169). Before the date of the second, Fuger told Allen that Gardner had been convicted of stock fraud and dealing in stolen U.S. securities (175, 375). Gardner said there must be another Michael Gardner (377). Allen stopped payment on the remaining checks and over Gardner's protest sent $5,000 to Kirby in Germany (177, 186). Allen knew that Kirby was in Europe, without funds, working on the two projects and he had decided to work directly with Kirby (187, 194, 377-78).

On April 9 Allen requested a progess report and a statement of how Gardner had disbursed the Porklean advance (G X 26, 195). Gardner visited Allen in Canada in May, submitted a draft agreement for a German Limited Partnership--the vehicle for the Porklean offering--and advised that an accounting would be forthcoming (GX 27, 200, XR, A-134). Gardner sent Allen a budget for the Porklean offering prepared by Kirby (GX 29, A-62) without back up information or documentation (204).

Allen had no further word from Gardner (except for a brief note GX 25) until August (236). On August 8 Allen terminated the Porklean agreement and asked Gardner for "a full accounting of the disbursal of funds and refund of any balance you have on hand" (GX 33-A, 239). Gardner responded by cable from Germany stating his intention to continue (GX 37, A-69, 241-42). Allen resisted any further contact (243).

Neither the White nor Porklean financings were carried out. Neither White nor Porklean received back from Gardner the monies advanced nor an accounting (243-44).

Fun Tyme (Counts 7 and 8)

Fun Tyme Packages Inc. is in the travel business. Hotel associations or government bodies, mainly in the Caribbean, appointed Fun Tyme to create package programs and market them through travel agencies and airlines (1215). They required, however, substantial letters of credit to guarantee payment (1216). Prior to 1975 Fun Tyme secured such letters from Manufacturers Hanover Trust Co. based in part on the personal guaranty of Katz, one of its principals (1218).

In January 1975, Katz was bought out of the company (1368). Fun Tyme had $200,000 to collateralize credit letters in that amount, but it needed substantially more (1375). Manufacturers Hanover refused additional funds without the Katz guarante .376-77, 1464). and several other banks refused credit as well (1219-20, 1458-59).

Fun Tyme's accountant and principal legal adviser, Mark Parker, then met Sy Guthrie. He put Parker in touch with Gardner (1378, 1383). Gardner and Parker negotiated an agreement dated January 15, 1975 in which Gardner agreed to produce twelve letters of credit with an aggregate $500,000 value within ten days (GX 90, A-90, 1224-28). Gardner's fee was $25,000; $7,500 to be paid at once (as it was, GX 97) and $17,500 on closing (1385). Guthrie was also to receive a finders fee if the deal closed (1386). If the letters of credit were not forthcoming due to fault of Fun Tyme, Gardner was entitled to keep the $7,500, otherwise not (1461-62).

At the end of January Gardner mistakenly advised Fun Tyme that letters of credit from the Bank Fiduciare of Lucerne, Switzerland had been sent to the beneficiaries (GX 70, 1246-47). After two weeks the letters had still not gone out and Fun Tyme had become both desperate and suspicious.

Fun Tyme was then put in touch with Patrick Carr, a New York attorney representing Bank Fiduciare (1253, 1396). He and Parker negotiated the collateral and other terms (1397). Ultimately Fun Tyme believed the letters would never come and sought financing elsewhere (1311). Fun Tyme requested its $7,500 back from Gardner without success (GX 99, 1257).

Country Clubs of America (Counts 9-12)

James Lofland, a promoter, induced Esther Armstrong and Myrtle Rupe, both widows, to invest in Cononado Country Club in Liberal, Kansas. He promised Armstrong and Rupe that he would repay their investments with proceeds from a financing. In December 1974 he came to New York to seek that financing, and met Guthrie (1590-91).

While in New York Lofland telephoned Armstrong, told her he was arranging a $700,000 loan for an advance fee of $7,000, and requested $4,000 towards the fee. She sent him the $4,000 on January 31, 1975 after reassurances from Guthrie that Lofland was legitimate. She received nothing (1616, 1728).

Myrtle Rupe made the December trip with Lofland, met Guthrie, and attended a meeting with a potential lender. He refused the loan (1727-30). She went with Lofland to Chicago to seek other financing sources, but those too proved fruitless (1730-31).

Lofland returned to New York in January. He told Rupe that Guthrie had introduced him to Gardner and that Gardner could get the $700,000 loan for an advance fee of 2% or $14,000 (1731-32, 1735). Gardner also told Rupe that he could arrange the commitment and have it funded, and asked Rupe to come to New York to sign as an officer of the borrower corporation, Country Clubs of America, Inc. (1737-38).

She did so (1739). Gardner drafted an agreement whereby Ekalb Investments, Inc. undertook to obtain a loan for a fee of 7% with 2% paid on signing the agreement and 5% on delivery of a commitment (1743). At Rupe's request an attorney reviewed the draft for her (1743-44) and suggested that the 2% advance fee be placed in escrow (1744).

The agreement, with the changes, was typed the next day at Gardner's office (1745), and signed by Rupe for herself and as president of Country Clubs of America, Gardner (for Ekalb), and Lofland and Guthrie (GX 300, A-93). Rupe agreed separately to pay Guthrie a finders fee of $5,000 when and if the loan closed (GX 299, 1749). Rupe gave Gardner's secretary a check for $14,000 to his order (GX 301, 1750). Only on the plane to Oklahoma did she notice that the escrow provision had been

crossed out. Lofland then told her the fee would be put in a special account (1754).

Rupe had several calls with Guthrie and Lofland in which they promised to call back and didn't or promised the commitment was on the way (1767-69, 1776). No letter of intent or commitment ever arrived (1752). On March 25, Rupe returned to New York, but on the advice of her pastor went first to the FBI (1794). She set up a meeting with Gardner, which he cancelled (1794). She returned to Oklahoma and at Lofland's instructions wired Gardner demanding the promised loan or a $14,000 refund (GX 293, 1775, 1777). The loan was not made and the money was not refunded (1777). It later turned out that during this period Gardner paid $4,500 to Guthrie's landlord for his rent.*

Barclays Bank (Counts 5 and 6)

Susan Braunig maintained an account at Barclays Bank. On December 3, 1974 she presented a check for $4,875 drawn on Metro Trust in Toronto by John Robert Barry (GX 56-A, A-15, 968). On December 4 she presented another Metro Trust check for $4,931.09 drawn by David Barnett (or Barrett) (GX 56-B, A-15, 968). She was the payee on both checks.

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* The Government tried and convicted Lofland for having defrauded Rupe, Armstrong and others on several real estate ventures, including Coronado. 75 Cr. 769, S.D.N.Y. This Court affirmed the conviction. Docket 75-1439.

Barclays accepts foreign checks only for collection. It does not credit an account until it receives the funds from abroad (974-75, 998). However, Barclays treated these checks as domestic out of town checks, and credited the Braunig account after seven business days (974-75).

In January and February the checks were returned marked accounts unknown. In the meantime Braunig had drawn on the funds so that the account was $9,797.01 overdrawn (978). When she failed to make up the overage Barclays closed the account, and obtained a default judgment against Braunig for the amount (GX 279-A, 932).

The Government charged that the signatures on the two checks were Gardner forgeries. An FBI expert so testified (2014). Kirby, Gardner's former associate, expressed the same opinion (526-28).

Charge Accounts and Credit Cards (Count 13)

In 1972 and 1973 Susan Braunig opened charge accounts at nine or ten New York City department stores. She stated on several applications that she had worked for World Wide Securities for four years as an administrative assistant to the president at salaries ranging from $10,000 to $16,000 (e.g.859). Years later she changed the name on some of the accounts to Susan Gardner or S. M. Gardner, the latter used also by Gardner. This reflected a change of name she effected with Actors Equity (she was also an actress), and also her relationship

with Gardner as a result of which she sometimes held herself out as his wife.

Gardner himself openly used some of the accounts (in a few he was an "authorized purchaser") and made payments thereon with his checks, showing his address. In almost every case payments had been made for prolonged periods (e.g. 848, 867, 889, 929). Only in 1974 or 1975--with Gardner in financial straits--were there arrears that could not be paid. There was similar proof with respect to several credit cards.

The Government's charge was that Gardner directed the filing of the applications, that they were false, and that fictitious names of S. M. Gardner were used so that both could take advantage of the cards. It was recognized, however, and the court so charged the jury, that these activities had to be part of a scheme to defraud. The Government's position was that Gardner and Braunig never intended to pay the bills and never did pay them (57). The proof of repeated payments, however, was a complete answer to that (e.g. 867, 890). The Government, in addition, failed to prove beyond a reasonable doubt that Gardner had directed or controlled the applications filed several years before by Braunig.*

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* Because Count 13 verges on the frivolous we dispose of it here rather than prolong the Argument portion of the Brief. Compare, for example, on the administrative assistant, "sanitation engineer", to wit garbage collector; and on the significance of Michael S. Gardner posing as "S. Michael Gardner", or "S. M. Gardner", Leslie Ross Allen posing as Ross Allen or L. Ross Allen.

Indictment and Trial

The present indictment is the third in this case.

The Government filed Indictment 75 Cr. 475 on May 16, 1975. The sole defendant was Gardner and the sole charge was the $7,500 advance fee scheme with Fun Tyme.*

After obtaining a host of Gardner documents through a grand jury subpoena on his accountant, who had them to prepare his tax returns, the Government filed superseding Indictment 75 Cr. 741 in July 1975. This indictment included Braunig and Guthrie as defendants and alleged each of the episodes as well as perjury counts against Braunig and Guthrie arising from their grand jury testimony in May and June 1975.

The third and last indictment, filed January 9, 1976 (A-7) made several changes in the form and structure of 741 and changed the statutory basis of the alleged Barclays Bank forgeries from 18 U.S.C. 482, 483, which did not apply, to the mail fraud statute. It named Gardner and Braunig in each of counts 1 - 13, and Guthrie in those relating to Fun Tyme and Rupe. It also carried over the now severed perjury allegations against Guthrie and Braunig.

Originally, the Court fixed the trial for January 29, 1976. When the Government requested a one week adjournment because Myrtle Rupe was ill, the Court put the trial over to

* Gardner was then on bail following convictions in New York and Illinois. The filing of 75 Cr. 475 resulted in his remand. He has been in prison ever since.

April, its first fee date. Meanwhile Braunig, who was free on bail, went to Montreal, was arrested there on false check charges, and was unavailable for trial. Gardner had intended to use her as his principal witness. During the delay Gardner started to deteriorate mentally, threatening suicide.

Trial commenced April 26 and lasted until May 26. Gardner's counsel raised a competency issue on the first day and thereafter submitted affidavits and a report of the Chief Psychologist at the Metropolitan Correctional Center in support of motions for a psychiatric examination and competency hearing (A-39-45). The district court denied the motions (A-35).

During its case the Government introduced voluminous proof as similar acts designed to prove motive and intent. The Government elicited as well every conceivable negative thing each witness either knew or heard about Gardner, including proof of Gardner's two prior convictions. Gardner testified in his own behalf. His attempt to have his wife, Judith Gardner, testify was denied because she had been present in the courtroom in violation of an exclusion order.

The jury convicted Gardner on all counts. This included count 11 in which he was charged as an aider and abetter of Guthrie notwithstanding that the jury acquitted Guthrie.

ARGUMENT

Point I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GARDNER ENTERED INTO THE WHITE HOLDINGS AND PORKLEAN AGREEMENTS IN ORDER TO DEFRAUD WHITE AND ALLEN.

The issue on White and Allen reduced to a single question. If, as the Government claimed, Gardner obtained the advance fees simply to pocket and never complete the projects, and if as the Government not only claimed (59) but proved (505-07), Gardner was penurious, why did he spend substantial sums and with Kirby do substantial work on the matters? There was argument about the exact amount spent, but there was no question, as we shall show, that work and money went into the offerings.

The Government never answered the question. Kirby had been closest to Gardner but had fallen out with him. The Government called him to testify, one would have thought, that the deals were sham. Kirby said exactly the opposite.

Clements had also been at Gardner's side during the negotiations. He too had had a falling out, and the Government called him as well (723). He did not testify that the deals were a sham.

The Government never overcame this crucial gap in its proof. We examine the record, focusing principally on

Kirby because he was the most active from Gardner's side.

(1) Gardner assigned Kirby to handle the European end. Kirby had in fact distributed stock in Europe with success (495, 509), and had extensive background and expertise for his assigned task. Tr. 604:

> "I spent many years as an apprentice in brokerage firms; I had my own brokerage firm; I worked very closely with lawyers putting companies together, financing them, and I was at one time investment counsellor here in New York, and I had extensive contacts in Europe who were subscribers to my service, and with these people I was successful in raising considerable amounts of money."

(2) Once Gardner received $25,000 from White (and at least several days before the final agreement was signed) Kirby was back in Canada "to put together the [offering] brochure, to form a corporation up there, to do the necessary things, to put the machinery to put the deal together" (515). He worked for ten days with White's son and numerous other executives from the twenty-one White enterprises (300-01, 639). There were at least five drafts of the brochure, a German version (517, 641, GX 14, 14A), a letter motivated by Kirby from the mayor of Niagara Falls (GX 14A, 617), and other descriptive letters (638). Gardner travelled to Canada to oversee the work (517). A final draft prospectus was finished before Kirby left for Germany (XF, XG, A-109, 293).

(3) The agreement required a Canadian holding company. Kirby introduced Gardner to a Toronto lawyer, Harry Kerr, "to incorporate a Canadian company" (522). Kerr chose the name

K. M. Investments. When the name was not available he used Ekalb Investments, the backward spelling of a lawyer in Kerr's office (XZZ, A-147, 524-25). Kerr did in fact take the necessary steps to establish Ekalb as a duly organized Canadian corporation (XZ, A-128, 624).

(4) Bank accounts and stock transfers in Canada were also required. Kerr was Toronto counsel to Metro Trust Company. He prevailed on Gardner and Kirby to open accounts there for the two corporations involved in the public offering as well as for themselves (524). Kirby and Gardner also arranged for Vic Perry, the Metro Trust transfer officer, to act as transfer agent (614), and for Metro to act as European depository for the funds received as the Niagara Falls cretificates were sold in Europe (615). Gardner had meetings with the Metro Trust president relative to these matters (615).

(5) Bufete Tapia & Linares, a law firm in Panama, was hired to, and did incorporate Niagara Falls Corporation (XC-1, A-103; XC-2, A-105, 278-80, 609). Gardner ordered and paid for stock certificates (XE-1, A-106; XE-3, A-108; XMTF, A-148; XMTG, A-149).

(6) On March 12 Kirby went to Europe to meet Sol Shubin. Shubin had been a broker in Toronto, Montreal and New York for many years, had retired, and had gone twelve years before to Germany where he had again been in the securities business (653-54). Kirby and Shubin saw about thirty five investment counselors and banks in Munich, Frankfort, Amsterdam, London, Geneva, Zurich and Hamburg (653), "a number

of printers" (551), and "some translators to try and get a brochure put together" with the color separations then being done in Niagara Falls (551). Kirby assured himself "that with the preliminary selling brochure. . . we could in fact raise the money that we anticipated to raise" (551).

(7) Kirby had numerous direct contacts with Allen relative to the Porklean deal (GX 49A, A-70; GX 49B, A-73, 554). See also XN, A-124 (Allen letter to Shubin, March 22, 1974); XO, A-124 (Allen letter to Kirby, April 4, 1974). Indeed, after terminating Gardner, Allen still was interested in working with Kirby, and attempted to do the Porklean offering directly with Shubin (XZ, Allen letter to Shubin, August 12, 1974, 351) and with Kent Olson (XR, A-134, Allen letter to Olson, August 12, 1974, 352).

(8) Kirby received expense money from Gardner. First there were two checks totalling $1,400 (GX 238-A, B, 545-46), later two more checks for another $1,000, including money for Kirby to go to Europe (GX 238-C, D, 549-50), another $200 (550), and another $500 in May (586). Thus by the Government's proof, about $3,500 of the $25,000 advance fee were payments to Kirby.

In addition in February 1974, Gardner paid a rent bill for Kirby and Clements in New York for $850 (XDA 755) and at least two other months of Clements rent (738). Kirby was living with Clements. Gardner paid over $1,000 of Kirby's expenses while he was in New York (665-66), airline tickets for trips to and

Buffalo, Toronto and New York (XKK, LL, MM), and several other hotel invoices (XNN, QQ, SS). Kirby called Gardner several times collect from Europe on the projects.

There were of course other expenses paid by Gardner, for example, legal fees and printing costs.*

(9) According to Kirby, he was prepared to effect the White offering in the Spring of 1974 provided he received $5,500 for the printer in Munich (552-53, 706). Gardner did not send it (553). After he returned to the United States he and Gardner "d[illegible]ed" and "agreed" that they would hold the [illegible]e matter in abeyance because "it was behind schedule already and it would be almost impossible to launch a campaign that late in the year" (593). In August they had a falling out and severed their relationship (600).

(10) In Kirby's view, the White and Porklean financing agreements were in all respects legitimate. Tr. 604-05:

> "Q. Am I correct that you went into the Niagara Falls and Porklean deals as legitimate business transactions?
>
> A. Absolutely. No question about it.
>
> Q. These were legitimate deals and your intention was to put and sell the underlying securities or to raise the financing as a legitimate business operation?
>
> A. Yes, sir.

---

* We do not suggest that these were the only expenses. They barely skim the surface of what Gardner spent. See particularly Kirby's budgetary descriptions in GX 29 (A-62), GX 30 (A-62), and GX 52 (A-77).

Q. Otherwise, you would not have got involved? Am I correct?

A. That is correct.

Q. And the operation was a legitimate business financial deal?

A. Yes.

Q. Both operations. I mean the Niagara Falls and the Porklean?

A. Yes."

The correspondence between Kirby, Gardner and Allen fully supports that testimony. We direct the Court particularly to XEE (A-138) where Kirby and Gardner structure the different things they must do on the two projects; Kirby's letters from Europe to Gardner, XVV (A-141) and XUU (A-143); and Kirby's letters to Allen, GX 49A (A-70), GX 49B (A-72) and GX 52 (A-77).

We return to our earlier point. A person desperately in need of money and working a scheme to defraud, will not spend substantial portions of his victim's money, and give his time and energy and the time and energy of those he supports, e.g., Kirby, in furthering the transaction. This is not an issue the jury can decide for the Government. Alone, but especially when coupled with Kirby's description of the legitimacy of their efforts, it is an inescapable defect in the Government's proof.*

* The Government will argue that Gardner immediately deposited and spent the $30,000 he received from White and Allen. Perhaps. But it is hardly a badge of fraud in the inception for a person in pressed circumstances, with continuing personal and business expenses, to spend part of the advance for general overhead to enable himself to perform rather then leave it in an interest bearing account. Gardner's problem was that when all was said and done, he just could not come up with vital cash when he needed it, not that he did not ever intend to do the offerings.

Point II

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GARDNER ENTERED INTO THE JANUARY 15 AGREEMENT IN ORDER TO DEFRAUD FUN TYME.

Again, proof adduced from contemporaneous documents and testimony the Governemnt cannot challenge or contradict, defeats conviction on Fun Tyme counts. Thus, as soon as the Fun Tyme agreement was signed Gardner was in telephone and cable communication with Switzerland about the letters of credit (XFA, A-151), and was constantly thereafter (Ibid; XFA-1, A-157).

On February 7, 1975 Bank Fiduciare had Bank of New York run a credit check on Fun Tyme (432-33), and telexed that Fun Tyme would open an account with a credit balance between $300,000 and $600,000, that Bank Fiduciare would deal with Fun Tyme through Bank of New York, and that Assen Ivanoff would contact Bank of New York that day on Bank Fiduciare's behalf (GX 80-A, 434-35).

Ivanoff did in fact contact Bank of New York on February 7, did in fact advise that Bank Fiduciaire would issue letters of credit, and requested Bank of New York to police the coverage in the Fun Tyme account (436). Ivanoff had several further meetings with Bank of New York about the policing (441-43).

Patrick Carr, a New York attorney, then entered the picture. Carr was retained by Ivanoff to represent the Bank (2217). Carr spoke with Mark Parker about Fun Tyme's requirements and terms.

On February 6, Mauricio Vigevani, the Bank Fiduciare representative flew to New York. Carr met that evening with him, Ivanoff and Gardner. Vigevani, according to Carr, "thought that the deal could be done if I assured him that according to the law of this country the guarantee and the collateral was sufficient" (2219). Vigevani even brought letters of credit with him (2223). It was contemplated that Fun Tyme would deposit $200,000 in a non-interest bearing account and pledge $300,000 or more in receivables as security for the rest (2220).

It is clear that negotiations over the collateral took place. Carr believed (but Parker denies) that at a certain point there was a meeting of the minds that the Bank would issue letters of credit in a face amount of $500,000 but valid only up to 40% of each letter unless the Bank gave its approval in advance (2222). On March 4 Vigevani telexed acceptance and on March 5 mailed to Carr twelve letters of credit made out to the various hotels and associations which were clients of Fun Tyme (2222-23, XFG, A-163). A week later, however, Parker told Carr that he had been trying to find financing for Fun Tyme which was not so expensive. On March 18 Carr cancelled the letters and mailed them back to Lucerne (2224, XFL, A-181). In the meantime Gardner had authorized Carr to pick up the remaining $17,500 on his fee at the closing (XFS; A-183, 2240-41). In Carr's opinion,

the deal was legitimate and Gardner wanted it concluded (2281).

In face of this overwhelming proof of the transaction's legitimacy from Gardner's standpoint, the district court erred in refusing to set aside the contrary jury verdict.

Point III

MATERIAL MISREPRESENTATIONS BY MYRTLE RUPE INDUCED GARDNER TO ENTER INTO THE COUNTRY CLUB AGREEMENT. SHE, NOT HE, WAS GUILTY OF FRAUD.

The conviction on counts 9 through 12 turn on one proposition: did Gardner know that Lofland and Rupe brought him a transaction which could not be funded.

To interest Gardner and to induce potential lenders (1838) Rupe and Lofland presented a written appraisal of $1.5 million supported by pictures, schedules, maps, membership lists, and letters (XCEF). A schedule showed the proposed disbursements of the funds, completion costs and mortgage payout (XCEG, A-187). The appraisal was a fraud.

First, it had been prepared by William Huggins, a "confederate" of Lofland, to whom Rupe paid $22,000 for a loan which never was made. Huggins became an officer and director of Country Clubs of America.

Second, without saying so, the appraisal was based on the assumption that there was a completed golf course, club house and site development (1838, 1843). The golf course was started but never finished (1838). The club house was finished but closed when the roof or part thereof was blown off by a tornado (1844). Roads shown on the maps had not yet been built (1840).

Third, the appraisal gave the impression that the club was a thriving operation. It included numerous pictures and a list of 200 members. After the tornado in August 1974 the club was closed and had no members thereafter (1856).

Fourth, the appraisal showed an artist's drawing of the club. It never looked like that (1857). Other pictures were in fact of the Del Safari Club in California (1864).

Fifth, the appraisal showed lakes in the golf course. The digging had been started but the lakes were not completed (1858).

Schedule A was equally fraudulent. Esther Armstrong was to be paid $140,000 out of the loan proceeds (1878). This would diminish by almost 20% the proceeds available for construction and operation and diminish the club's security value. Schedule A omits mention of the Armstrong takeout.

Gardner could not have obtained financing for the Club except by himself becoming a party to the fraud of Rupe, Lofland and Huggins. His refusal, therefore, to continue was the sole avenue open to him (GX 302, A-99). The Government could prove its charges only by showing that when he took $14,000 from Rupe, he knew her presentation was false.

The proof does not show beyond a reasonable doubt that the true nature of the loan application was brought to Gardner's attention. It defies common sense to suggest that Rupe thought she could get a loan from Gardner after telling him the facts.

Rupe had been heavily involved in business for many years (1819-20). She had made two trips to New York and Chicago to interest lenders to part with $700,000. Why would she conceivably give an advance fee of $14,000 for a loan which, if the facts were known, could never be made? Her actions become explainable only on the basis that the facts would not be known. Gardner might be taking her money but at least by concealing the true state of affairs, she had a chance fraudulently to obtain a loan through him.

It is not only common sense, Rupe admitted at trial that she told Gardner nothing about the fraud in the appraisal. For example, when Rupe testified that the lakes shown in the appraisal hadn't been completed in 1975, she was asked: "Did you tell that to Mr. Gardner?" She answered" "No, we didn't discuss that. He didn't ask me" (1859). Furthermore:

> "Q. Did you tell Mr. Gardner that the golf course wasn't completed?
>
> A. No, I didn't. He didn't ask me.
>
> * * *
>
> Q. Did you tell him it had no members?
>
> A. No, I didn't. He didn't ask me."

Although there was a discussion in her presence, with Gardner, about the clubhouse being closed, it was only "for repairs" (1877). No one told Gardner that this temporary closing for repairs was really permanent.

Finally, Associated Investors, the first mortgagee, had already commenced to foreclose on the property, which resulted in a foreclosure sale several months later (1832). The Government brought forth no proof that Gardner was told of the foreclosure suit before he undertook to arrange a loan.*

Point IV

THE BARCLAYS BANK EPISODE DID NOT VIOLATE THE MAIL FRAUD STATUTE.

The Barclays Bank claim fails as a matter of fact and law. The overriding fact is Barclays' practice to take foreign checks only for collection (998). It is not credible that Gardner would deposit a forged foreign check in a well known

* The February 18 agreement required Rupe to guarantee the loan personally and for that purpose to supply Gardner with a personal financial statement (1885). Rupe had a statement prepared as of May 1, 1974 which showed a net worth of $279,303.56 (XCDD, A-190). A statement one month later (XCEF, A-185) showed a net worth of $690,769.79. This statement, prepared by Huggins, was also fraudulent for the reasons set forth in GX 302, A-99, Gardner's April 1 letter to Rupe and Lofland.

international bank which does not credit the account until funds have arrived.* Even if the teller made a mistake (999) there were other controls. In fact the transit department saw the error within two days of Braunig's presentation to the Bank (1001-02), but still on December 16 credited the Braunig account with the two deposits and on December 24 sent out a statement indicating that the checks were good (1003).

There is, in any event, a use of the mails issue. The Government conceded in Strauss v.United States, 516 F.2d 98 (7th Cir. 1975), and the Court also held, that an ordinary check kiting scheme does not fall within the mail fraud statute because the required mailing is not sufficiently closely related to the scheme. United States v. Maze, 414 U.S. 395 (1974) (fraudulent use of credit card not within the statute); United States v. Travers, 514 F.2d 1171 (2d Cir. 1974) (same). Other decisions, collected in the district court opinion denying Gardner's motion to dismiss based on Maze are contrary (A-24), e.g., United States v. Shepherd, 511 F.2d 119 (5th Cir. 1975).

Strauss, we submit, better understands the thrust of Maze and should be followed here, in view particularly of the Government's proof that the Barclays episode was not an ordinary check kiting scheme but one which depended on the multiple error of Barclays, long before mailing, in taking for deposit what it should have taken for collection.

* Gardner's explanation of the checks was that he received them after giving promissory notes to the drawers (GX 507, 508).

Point V

THE DISTRICT COURT ERRED IN ADMITTING INTO EVIDENCE EXTENSIVE PROOF OF SIMILAR ACTS AS WELL AS GARDNER'S PRIOR CONVICTIONS.

Federal Rules of Evidence 404(b) permits evidence of other crimes to evince motive, intent, knowledge or absence of mistake or accident, although not to show bad character. United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Torres, 519 F.2d 723 (2d Cir. 1975); United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975); United States v. Braverman, 376 F.2d 249 (2d Cir. 1967); United States v. Deaton, 381 F.2d 114 (2d Cir. 1967). However, evidence otherwise within Rule 404(b) must be excluded when its potential prejudice outweighs its probative worth, F.R.Ev. 403. United States v. Torres, 519 F.2d, 727. The problem is to define the instances where that is so. United States v. Falley, 489 F.2d 33 (2d Cir. 1973), United States v. Accardo, 298 F.2d 133 (7th Cir. 1962) and Bullard v. United States, 395 F.2d 658 (5th Cir. 1968) furnish three authorities for exclusion. This case, we submit, must furnish another.

First is the indictment itself. Michael Gardner was tried jointly on more than fifteen different charges: that he defrauded Arthur White, that he defrauded Rose Allen, and the same as to Fun Tyme, Esther Armstrong, Myrtle Rupe, Barclays Bank,

and numerous department stores and banks. This meant that as to each particular charge, the Government also placed before the jury, as evidence of defendant's guilt on that charge, the evidence of his guilt on all the others. Indeed, the Government joined the various transactions in one indictment on the basis that they were "of the same or similar character" or "constitut[ed] parts of a common scheme or plan". F.R.Crim. P. 8(a). See also the Government's routine argument in this Court; it is entitled to join several crimes in one indictment "where the evidence of one of the crimes would be admissible in a separate trial for the other crime." Brief for Appellee, United States v. DiGiovanni, 2d Cir. No. 76-1097, pp. 14-15.

When, then, the Government already has at least fourteen similar acts on each of the charges, the incremental probative worth of a host of additional crimes is non-existent, or at best minimal. The only function they really serve is to create an "overmastering hostility", United States v. Brettholz, 485 F.2d 483, 487 (2d Cir. 1973), a jury view that the defendant has bad character and therefore must have committed the crimes in question -- exactly what Rule 404(b) prohibits.

To make the point we review some of the extensive

similar act proof by the Government.* We recognize that in doing so we run the danger of creating the same impression in this Court which the Government succeeded in creating for the jury, to wit, that a defendant who did these things must have intended the frauds charged in the indictment. We believe, however, that the distinction the jury could not maintain -- between the general evidence of Gardner's bad character and the hard specific evidence demonstrating that the deals in question were legitimate -- will be maintained here.

Underwriters Bank

In late 1972, World Wide Securities owed money to the Underwriters Bank because of an overdraft (498, 1159). Gardner put two stocks in escrow with the Bank with the proceeds of their sale to be used to pay off the debt (496, 1163). The

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* It is indeed "some". There was, for example, other devastating proof from disconnected phones (812) to furtive instructions or dishonest acts by Braunig (with which Gardner had no connection) proven through two employees who worked temporarily for Braunig (e.g. 1333-37, 1346-48, 1545-48), to comments on Gardner's marital problems, to entry of default judgments against Braunig by Arnold Constable and American Express (GX 277, 278).

United States v. Papadakis, supra, and United States v. Klein, 340 F.2d 547, 549 (2d Cir. 1965) require an explanation to the jury of the limited purpose of similar act evidence. Where properly alerted, e.g. 1011, the district court did so. The similar act evidence was so extensive, however, and so interwoven into the testimony that on many occasions no such instruction was given (e.g. 959-60).

stocks could not be sold (500-03).*

Ultimately, the account was closed in 1972 with an overdraft of approximately $32,000 (1163-64), after $68,000 in deposited checks had been returned for insufficient funds (1178).**

Ohio Corrugated

In early 1974 Fuger and Gardner sought to take over a company called Ohio Corrugated. Gardner was to arrange the money. The take-over was not accomplished (508), the Government arguing that this demonstrated Gardner's knowledge of his inability to achieve promised financing.

The Kirby Manufacturer's Hanover Account

Kirby opened an account with $100 at Manufacturers Hanover in May 1974. He gave Gardner's office address. He discovered several months later that someone had closed the account, and endorsed his name on the close out check with the legent "Pay to the order of Ekalb Investments, Ltd." In his opinion Gardner signed the endorsement (586-89, GX 53).

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* One was Royal Airlines. Notwithstanding that Kirby, who gave testimony on the point, had no knowledge of its operations, and so answered, the Assistant asked (501): "Do you know whether that airline even had an airplane?", conveying a stock fraud as well as an overdraft fraud on Underwriters.

** Later proof, not qualified by a limiting instruction, implied that Gardner had bribed a bank employee to permit the overdrafts (1545-46).

$5,000 Check, Barclays Bank

Gardner wrote a $5,000 check on his Barclays account, which was certified by the holder (965). The bank should have debited Gardner's account that same day. It did not (966, 993). A few months later the bank discovered the error and entered the debit, creating a $4,995 overdraw (966). When Gardner could not then make up the difference, the account was closed (967), and Barclays obtained a default judgment (GX 279-B, 932).

Ekalb Checks, Barclays Bank

Ekalb drew two checks to a Hermance Investments Company, each for about $23,000, when there were insufficient funds to cover the checks (959-60). By mistake Barclays paid the second check. Barclays appropriated a $10,000 balance in the Gardner account for the Ekalb check, he protested, and in view of the protest Barclays re-credited his account (961-62).*

Seizure from Braunig in Montreal

On March 12, 1976 the Montreal police arrested Braunig at the Provincial Bank of Canada and seized numerous documents admitted into evidence as proof of intent with respect to counts 5, 6 and 13 (1011-13). The evidence (GX 407-11)

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* Barclays was able to recover the money back from Credit Suisse, to whom it originally paid the money, and lost nothing on the transaction (1006).

included numerous Canadian checkbooks and bankbooks evidencing, according to the Government, a check kiting scheme, as well as other banking documents showing joint accounts of Susan and Michael Gardner.

This, as we have said, is but some of the proof. In addition there were at least sixteen unjustified innuendos, set forth in Gardner's motion to set aside the verdict (A-46) which further cemented the picture of Gardner as a defendant who would commit about any fraud.

The lesson, we submit, is clear. The more unsavory the defendant's background, the more the prosecution will be armed with similar acts to establish fraudulent motive and intent. The point inevitably comes, however, where if the Government tells the jury all it has, no defendant with an extensive record (as Gardner had here) can receive a fair trial. The jury cannot keep its focus on specific charges when subjected to a barrage of evidence demonstrating that defendant is of bad character. Rule 404(b) and the cases recognize the point.

The remedy must come in the first instance from the prosecution. The Government also has an obligation to protect defendant's rights by not distorting the jury's consideration of specific issues with massive general proof that defendant has a criminal character. The Government recognized no such obligation here, and the district court, by its rulings that everything could come in under motive and intent, failed also to understand it.

Gardner's Prior Convictions Should Not Have Been Admitted Into Evidence

The Government insisted that Gardner's denial on March 15 of his earlier convictions led Allen to continue with the Porklean deal and to send $5,000 directly to Kirby on April 1, 1974 (719-20). To prove that Gardner had lied to Kirby the Government introduced into evidence copies of Gardner's stock fraud conviction in the Southern District of New York (GX 419) and his stolen securities conviction in the Northern District of Illinois (GX 420) (1581-83).

On March 22, however, Allen had written Gardner (XMTL, A-150) that he had "confirmed" from the FBI and Probation Department that Gardner had in fact been twice convicted and that another serious charge was then pending. Allen continued: "we are not particularly concerned other then (a) your name in front affecting the sale of securities in Europe (b) your ability to write cheques if in the gaol."

Thus, even if, as the Government claimed but Gardner denied, he had misled Allen, that had not been the prelude to any acts by Allen which continued the alleged scheme. Allen sent Kirby funds on April 1 (188) after he already knew the truth.

Since the Government's theory of admission was so obviously wrong, and the convictions so prejudicial, the district

court should not have admitted them.*

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* We note also that the $5,000 sent for Kirby was used for legitimate expenses in connection with the two offerings. Kirby testified (555):

> "Q. And did you receive $5,000 from Mr. Allen?
>
> A. Yes I did.
>
> Q. And what did you do with it?
>
> A. I paid my traveling expenses and hotels and phone fares.
>
> ***
>
> Q. Did you then [after receiving the $5,000 from Allen] continue to stay and work in Europe?
>
> A. Yes. I was there for a while after that."

See also Tr. 705: Kirby's European hotel and airline bills were paid in the main part by Allen's $5,000.

Point VI

THE DISTRICT COURT ERRED IN BARRING JUDITH GARDNER FROM TESTIFYING, IN REFUSING TO PERMIT GARDNER TO REFER IN SUMMATION TO THE GOVERNMENT'S BILL OF PARTICULARS, AND IN DENYING GARDNER THE RIGHT TO PROVE HIS ACQUITTALS.

The broad standards of admissibility which the district court accorded the Government (Point V) were not similarly extended to defendant.

Testimony of Judith Gardner

Judith Gardner has been married to Gardner for fifteen years. They have three children. She attended most of the trial. That was important, since Gardner had been romantically involved with Braunig. His wife's presence was reassurance that this had not led to her deserting him. He was also mentally depressed.

On the first day of trial, the court ordered exclusion of all witnesses (27). F.R.Ev. 615. Judith Gardner was not then a witness or contemplated witness. There was no reason to believe the order would affect her. Late in the trial, however, Gardner's counsel decided to have Judith testify to rebut certain parts of the Government's case. The Government objected on the basis of the exclusion order, and the district court sustained the objection (2286-87).

Since at least Holder v. United States, 150 U.S. 91 (1893), a witness cannot be disqualified because he has violated an exclusion order. United States v. Vario, 484 F.2d 1052 (2d Cir. 1973). The matter is not one of the district

court's discretion. The bar against disqualification solely because there has been a violation is absolute. Holder v. United States, supra:

> "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt, and his testimony is open for comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely. . ."

The district court has discretion to disqualify the witness under "particular circumstances". The authorities make clear, however, that this requires a demonstration that the violation was intentional and was brought about with the "consent, connivance, procurement or knowledge of appellant or his counsel." United States v. Schaeffer, 299 F.2d 625, 631 (7th Cir. 1962); Taylor v. United States, 388 F.2d 786 (9th Cir. 1967). See also United States v. Bostic, 327 F.2d 983 (6th Cir. 1964), Braswell v. Wainwright, 330 F.Supp. 281 (S.D. Fla. 1971). That did not occur here.

The jury, therefore, and Gardner, should have had the benefit of Judith Gardner's testimony. The district court erred in ruling otherwise, an error which, as in United States v. Schaeffer, supra, requires reversal.

Prior Acquittals

In its Memorandum requesting permission to offer proof through Ross Allen that Gardner had twice been convicted, the Government argued that if it was "barred from any reference to Gardner's prior convictions, the defense ought similarly to be barred from any reference to Gardner's prior acquittals."

Memorandum filed 4/28/76, p. 5. Although the Government was not barred from showing the convictions, Gardner was barred from showing the acquittals.

This was error. Perkins v. United States, 315 F.2d 120 (9th Cir. 1963) (acquittals of witness admissible once Government attacks credibility).

Bill of Particulars

At the close of his case, Gardner sought to introduce the Government's bill of particulars (3159). The bill, amplifying the charges in the indictment, alleged that as part of the White, Allen and Fun Tyme advance fee schemes "Gardner and his confederates simply pocketed the money". Defense counsel wanted to argue that the proof of record was contrary to this claim and therefore the Government's charges should not be sustained (3160-61). The district court rejected the offer and prevented defendant from referring to the bill in summation (3159-60, 3206).

The indictment was before the jury (3451). The bill of particulars, whether it came from the grand jury or the Government (a distinction drawn by the district court, 3160), constituted part of the Government's claims. Defendant was entitled to have the jury know the exact scope of those claims. Whether formally in evidence or not, the district court erred in keeping the contents of the bill from the jury. Cf. United States v. Powers, 467 F.2d 1089 (7th Cir. 1972) (pertinent to show prior prosecution inconsistent with present charge).

Point VII

THE DISTRICT COURT ERRED IN REFUSING TO GRANT A PSYCHIATRIC EXAMINATION AND HEARING ON THE COMPETENCY ISSUE.

Under 18 U.S.C. 4244, and following Drope v. Missouri, 420 U.S. 162 (1975), and Pate v. Robinson, 383 U.S. 375 (1966), the district court, on motion of defendant, is obligated to appoint "at least one qualified psychiatrist" to examine and report unless the competency motion is frivolous or not made in good faith. That is the only requirement to satisfy Sec. 4244's "reasonable cause" standard for such an examination Rose v. United States, 513 F.2d 1251, 1255-56 (8th Cir. 1975):

> "Initially, we note that a trial court may deny a request for a 4244 examination only if the court believes that the request is frivolous or has not been made in good faith. The court is not to make an initial inquiry into whether the accused is in fact competent before it orders the 4244 examination: if the motion for a psychiatric examination shows reasonable cause to believe that the accused may be incompetent, that the court is required to order the examination of the accused. . . .
>
> * * *
>
> "The implication of the procedural scheme established in 4244 for determining the competency of the accused at the trial stage is that the determination of competency should be made by the district court only after it has the benefit of a psychiatric report on the accused's mental condition and, if necessary, an evidentiary hearing, unless, of course, it appears that the motion for an examination is not founded upon reasonable cause and therefore is frivolous and not made in good faith." (Emphasis supplied)*

* The emphasized portion of the Rose opinion demonstrates that "reasonable cause" means no more than non-frivolous.

Moreover, only a hearing can test the conclusions of an adverse report or determine evidence not within its scope. United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971) (hearing required unless defendant submits only bald conclusions, without evidentiary support of any kind); United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974) ("inescapable duty" of trial court to grant hearing).

Gardner's counsel moved for appointment of a psychiatrist and a hearing. His requests were denied (1781-82, A-35). However, the facts before the district court satisfied the threshold burden under 18 U.S.C. 4244, and more.

At the trial's outset the court observed Gardner rip a document and fling it across counsel table, "in some state of anxietv." (5). Counsel reported that Gardner subjected him "to abuses and curses and insults," was not "coherent in terms of knowing what is really going on here", and was not "competent in terms of my own dealings with him." (5-6)* After considerable effort Gardner's counsel had obtained an order permitting him to take the deposition of Braunig in Montreal (Memorandum and Order, April 21, 1976, A-25). As part of the same outburst Gardner refused to waive his appearance at the deposition, as required by the order, tore up the papers relating to it, and brought an end to the whole matter (9).

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* See also Tr. 534-36.

The court had a letter from Gardner's wife as well as affidavits from three MCC inmates (214-16, A-42-45). According to Mrs. Gardner for the past month her husband was very depressed, neither slept nor ate, frequently cried, and spoke of suicide. She expressed extreme concern about his mental state.* One of the inmates said that Gardner "talked many times of commiting suicide and I believe he is currently so depressed if he had a means he would." Another heard suicide threats and Gardner "talk[ing] incoherently with tears running down his cheeks. . . not the way of a rational man". The third heard Gardner ask God to take his life. He could not sleep because he was sure Gardner might try something.

Finally there was a report from Thomas Caffrey, Chief of Psychological Services at the Metroplitan Correctional Center, (A-41), making these observations.**

a) Gardner had visited Caffrey because of suicide dreams.

b) Gardner's "self-assurance, belief in himself, and desire to continue living [had] noticeably deteriorated," in recent days.

c) Gardner was then "actively suicidal". Only three of four MCC inmates were in that state.

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* Mrs. Gardner taught psychology at Hunter College and was also a third year doctoral student in Biopsychology. Her views, therefore, merited special consideration.

** Caffrey's examination and report was not the psychiatric examination called for by Sec. 4244 (217).

d) these symptoms were not part of a defense strategy.

e) Gardner was experiencing a "serious depressive-type reaction", for which psychotherapy was essential, although he did not have "organic impairment, deteriorative-type loss of functioning, or schizophrenic-like thought disorder".

f) the court should "treat the psychopathological aspects of Mr. Gardner's behavior with the utmost seriousness."

Because essentially, it was in a position to observe, and Gardner had seemed capable of assisting his defense, the district court denied the competency motion. It was wrong. Observations of Gardner could be relevant to the competency issue. They could not be conclusive, Pate v. Robinson, supra, Rand v. Swenson, 501 F.2d 394, 395 (8th Cir. 1974), especially after Gardner's repeated suicide threats, Drope v. Missouri, supra, his counsel's report that Gardner could not properly assist in his defense, Rand v. Swenson, supra, Drope v. Missouri, supra, and finally, a report from the chief MCC psychologist that Gardner was actively suicidal, in need of treatment, and evincing symptoms which had to be treated with the utmost seriousness.*

Gardner's position therefore was neither frivolous nor asserted in bad faith and satisfied the statutory mandate.

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*A polite way of saying that a further psychiatric examination was in order.

Rose v. United States, supra; United States v. Polisi, 514 F.2d 977 (2d Cir. 1975); United States ex. rel. McGough v. Hewitt, 528 F.2d 339 (3d Cir. 1975).*

CONCLUSION

In view of the Government's failure to prove the charges in the indictment, this Court should direct dismissal thereof.

Barring that, there should be a dismissal of count eleven because Gardner cannot aid and abet when Guthrie, the principal, was acquitted; counts five and six under United States v. Maze; and grant of a new trial as to the rest because of the district court errors set forth in Points V, VI and VII.

Respectfully Submitted,

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Michael Gardner

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* Contrary to the district court (45) neither United States v. Saddler, 531 F.2d 83 (2d Cir. 1976) nor United States v. Hall, 523 F.2d 655 (2d Cir. 1975) justified denial of Gardner's competency motion in light of the record in this case.